

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 29 OF 2005**

S T A T E

.... Appellant

V/s

1. Dinesh S. Naik,
H.No. 199, Aradi Bandh,
St. Cruz.

2. Chandrakant @ Appu B. Talwar,
H.No. 328, Bandh, St. Inez.

3. Paresh M. Naik,
R.No.9, B-7, Police Qtrs.,
Porvorim.

4. Anthony Dias @ Kenaudekar, (Dropped)
H.No. 1022, Indiranagar,
Chimbel.

5. Bharat @ Balaram Karishetty, (Dropped)
H.No. 215, St. Inez.

.... Respondents

Mr. C.A. Ferreira, Public Prosecutor for the Appellant.
Mr. J. Godinho, Advocate for Respondent No.1.
Ms. A. Desai, Advocate for Respondents No. 2 & 3 .

CORAM : N.A. BRITTO, J.**DATE : 9th AUGUST, 2007****ORAL JUDGMENT :**

The State of Goa has filed the present appeal against the acquittal of the accused under Sections 342, 395 r/w 120-B I.P.C., by judgment dated 4/12/2004 of the learned Assistant Sessions Judge, Panaji.

2. The case of the prosecution was that on 10/4/2001 between 13.30 hrs. to 19.30 hrs. at the hill side near Goa University at Bambolim, the accused entered into criminal conspiracy and A-4 Anthony Dias @ Kenaudekar hired a motorcycle bearing No. GA-01-L-7896 of the complainant Pradip Sawant from Marcela at 13.30 hrs. and brought him to the said place and confined him there and thereafter went again to Calangute at about 17.00 hrs. and hired Yamaha motorcycle bearing no. GA-01-B-3163 from Sashikant Kambli and brought him to the same place and assaulted them with slaps, tied them with a piece of cloth and telephone cable to a cashew tree and snatched cash of Rs. 227/- and Rs. 500/- respectively and robbed their motorcycles and thereby committed the said offences.

3. Accused No. 4 Anthony Dias @ Kenaudekar and accused no. 5 Bharat @ Balaram Karishetty were ordered to be tried separately by order dated 21/08/2002 of the learned Sessions Judge, Panaji. The learned Sessions Judge, Panaji had directed that separate charge sheet be filed against the said juveniles before the Juvenile Court and one does not know whether a charge sheet as directed by the learned Sessions Judge was ever filed, or not.

4. Be that as it may, charge was framed against the accused nos. A-1 Dinesh Naik, A-2 Chandrakant Talwar and A-3 Paresh Naik on 15/10/2003 to which all the accused pleaded not guilty.

5. Their case is one of denial simpliciter. Prosecution examined seven witnesses which included the said complainant PW2 Pradip Sawant and PW3 Sashikant Kambli whose complaint was not recorded because the complaint of PW2 was already recorded. PW1 Srikant Naik was the panch witness to the scene of offence panchnama. PW4 Mukund Gawas was the panch witness to the recovery panchnama of the motorcycle bearing no. GA-01-B-3163 at the instance of the said accused no. 4 Anthony Dias @ Kenaudekar. He was declared hostile and cross-examined. PW6 is the head constable attached to Porvorim police station, who attached the motorcycle GA-01-L-7896 belonging to PW2 Pradip Sawant which according to him had met with an accident and the same was later on inspected by PW5 Umesh Palkar, a mechanic in the police department.

6. The learned Assistant Sessions Judge after considering the evidence of the prosecution witnesses came to the conclusion that the stolen motorcycles were not recovered at the instance of any of the accused. The learned Assistant Sessions Judge also observed that the victims namely PW2 Pradip Sawant and PW3 Sashikant Kambli were not knowing the accused prior to the crime and therefore they had given the complaint against unknown persons and therefore it was obligatory on the part of the prosecution to have held identification parade after the arrest of the accused and since it was not held and the identification was done for the first time in Court, it could not be

given any weightage as the said victims had seen the accused at the police station and also in the corridor of the Court before their depositions. The learned Sessions Judge also noted that PW3 Kambli had expressed doubt about the identity of the accused no.2 Chandrakant Talwar.

7. Admittedly, the incident took place on 10/04/2001 and PW2 Pradip Sawant was examined in Court on 5/01/2004. Likewise PW3 Sashikant Kambli was examined in Court on 17/06/2004.

8. As far as identification of the accused is concerned, PW2 Pradip Sawant had stated that after about 15 days of the incident he had seen the photograph of the accused and other two persons (presumably referring to A-4 and A-5) on the newspaper and then he had been to the police station where he came to know that his motorcycle had met with an accident at Porvorim and subsequently he got the possession of the same through the order of the Court. He further stated that at Agassaim police station an identification parade was held in which he had identified the said Anthony Dias (A-4) and the remaining 4 persons. PW2 Pradip Sawant conceded that he had not known any of the accused persons and others prior to the incident. PW3 Sashikant Kambli identified A-1 Dinesh Naik from amongst the persons who had come rushing towards him when A-4 Anthony had signaled by whistling. He stated that he could not with certainty identify A-2 as one of the said

persons. PW3 Sashikant Kambli did not, unlike Pradip Sawant, speak of any identification parade being held at the police station for the purpose of identifying the accused. So also PW7 P.I. Karekar has been silent about the same. In fact PW2 Pradip Sawant has not given any details as to the identification parade, referred to by him which was held at the police station. It is doubtful whether any of the accused would have been at the police station after 15 days of the incident. They would have been in judicial lock up.

9. Counsel, on behalf of the accused no.1 Dinesh Naik, has placed reliance on the case of *Vijayan @ Rajan V/s. State of Kerala (AIR 1999 SC 1086)*. In this case, the photograph of the accused was published in all local newspapers and was shown to the witness before the test identification parade and the evidence of the test identification parade was held to be not reliable. The Apex Court also held that subsequent identification of accused in Court by witness after many years could not be relied upon and the evidence of other witnesses identifying him at the later point of time was also found not to be reliable when the accused was unknown to them and no special features were indicated by them. In the case at hand it is doubtful whether PW2 had at all identified any of the accused at the police station and even if he had done so, he must have identified after he saw the photograph on the newspaper and based on the said photograph he subsequently identified the

accused after a lapse of almost 3 years in Court and such identification could not be accepted as free from doubt. Accused Nos. 2 & 3 therefore deserve to be given benefit of doubt and their acquittal therefore could not be faulted.

10. However, the case of the accused no.1 Dinesh Naik stands on the totally different footing. Learned trial Court has not at all considered other evidence against him.

11. PW2 Pradip Sawant stated that he is a motorcycle pilot by profession and functions from the motorcycle stand at Marcela and he owns motorcycle no. GA-01-L-7896, custody of which he took subsequently by order from the Court. As stated by him on 10/04/2001, at about 12.30 p.m. while he was at the said motorcycle stand one person came to him and requested him to drop him at Panaji and when he brought him to Panaji he requested him to take him near Goa University and as such he was required to pay another Rs. 50/- in addition to Rs. 100/- as agreed earlier. He further stated that after reaching near Goa University the person told him to take him little further on a kacha road and since the condition of that road was bad he told him that he would not be able to proceed further and after reaching a little distance the said person caught hold of the collar from the backside and as a result both of them fell down from the motorcycle and as they fell down from the motorcycle the said A-4 Anthony Dias took away the key of the motorcycle

and went little further and thereafter 4 more persons came to the spot from among the bushes and all the 5 persons thereafter caught hold of him and made him sit under the banyan tree and thereafter the said accused no.1 Anthony Dias told him to remove his pant and took away Rs. 225/- which was in his purse but returned the licence which was in the purse. He stated that after about 2 hours somebody brought one more person there who was made to sit near the banyan tree and thereafter the accused and others brought one bottle of liquor (urrak) and also chillie chicken and consumed the same and also requested him to have some of it and after sometime the accused and others brought one watermelon and all of them ate the same and at about 7 to 7.30 p.m. the accused and others tied him and the said other person to two cashew trees with the help of telephone wire and torn pieces of cloth, one of which was of blue colour and thereafter the accused went away and after sometime he got himself released and went to the house of a catholic family which was at a little distance from the spot and from there he phoned his brother at his residence who came to take him and thereafter they went to the police station at about 12 p.m. where he filed his complaint. He stated that while leaving the spot the accused and others took with them his motorcycle as well as the motorcycle of the said other person. In cross-examination he stated that he had not mentioned the name of the accused no.4 Anthony Dias in his complaint but had mentioned about him in his supplementary statement.

12. PW3 Sashikant Kambli stated that he was at the Calangute market alongwith his motorcycle No. GA-01-B-3163 and was waiting for customers when at about 5 p.m. one person whose name he came to know subsequently as Anthony Dias (A-4) told him that he was required to be taken near Cidade de Goa Hotel at Dona Paula and he told him that his hire charges would be Rs. 150/- and when they reached Dona Paula he told him to take him towards the University and upon reaching there further requested him to take from the internal road leading towards the jungle and soon thereafter told him to stop and when he stopped he started demanding money from him and when he refused, he took out a knife. He stated that he told the said Anthony that he did not have any money and it is he who had to give money to him as his hire charges, when the said Anthony whistled and called for one Dinesh and on hearing his whistle 3 persons who were already hiding nearby came rushing towards him and all 4 of them caught hold of him amongst whom was accused no.1 Dinesh and there was one more person by name Chandrakant (accused no.2). However, he stated that since many years had passed he could not identify A-2 with certainty as the same person. PW3 Sashikant Kambli stated that he was then taken to a hillock where there was already one person who was made to sit on the rock and thereafter the accused made him to take out his pant and also took his wallet and removed Rs. 500/- from the said wallet and returned the same and so also his licence and after the incident, two of them went away and three remained guarding him and one

more person, and after that, they came back at around dusk and tied him and the other person. He stated that he was tied to a cashew tree with both his hands at the backside with the help of a piece of cloth and cable wire and the other person was also taken at a distance and was also tied and after tying both of them all the accused fled away alongwith his motorcycle and he made efforts to release himself and then met one person and requested him to reach him to Panaji and thereafter he hired a pilot at Panaji and went to his home at Calangute and from there to Anjuna police station to lodge a complaint and from where he was directed to go to Panaji police station and when he went there they in turn directed him to Agassaim police station, where he was told that the investigation had already commenced and his statement was recorded at the police station and a supplementary statement was recorded after about 5 days and he was then shown the accused and he told the police about the role played by each of the accused.

13. PW1 is a panch witness taken by the Investigation Officer to conduct the scene of offence panchnama. According to him there was an electric pole, a banyan tree and some cashew trees. PW1 Srikant Naik has stated that they also found a bill at the spot dated 10/04/2001 for a sum of Rs. 96/- towards purchase of 2 chillie chicken, 7 breads, 2 limcas, ½ bottle urrak and 1 cigarette and PW3 Kambli also pointed out to one telephone wire which was in 2 pieces of the length of about 1 meter and 2 meters respectively and

then told them that he was tied to a cashew tree with the said wire. He has confirmed the carrying out of the said panchnama of the scene offence and attachment of the said articles, which to a great extent support the case of the complainant PW2 Pradip Sawant and PW3 Kambli.

14. The learned trial Court did not at all consider other evidence particularly of PW6 who was head constable working at Porvorim police station. As stated by him on 12/04/2001 when he was on SHO duty at the Porvorim police station, he received a phone call that there was an accident near the junction at O Coqueiro at Porvorim and he registered an accident under no. 47 of 2001 and visited the scene of accident where he found one Suzuki motorcycle bearing no. GA-01-L-7896 which was kept in standing position on the kacha road, on the road side facing Mapusa and the accused was standing close to the said motorcycle and when he questioned him, the accused admitted that he was riding the said motorcycle. PW6 Sawant further stated that he called two panch witnesses and conducted the scene of offence panchnama and a sketch, copies of which he produced to support his statement. The panchnama and the sketch show that the said motorcycle was on the right hand side of the road as one goes from Panaji to Mapusa, near O Coqueiro Restaurant. PW5 Palkar, a mechanic from the police department stated that on the next day i.e. to say on 13/04/2001 he inspected the said motorcycle bearing No. GA-01-L-7896 and found certain damages like bent

to the supporting guard, rear right side light was bent and there were scratches on the head light. He also produced the report prepared and submitted by him.

15. PW7 P.I. Karekar confirmed having recorded the complaint of PW2 Pradip Sawant at 00.30 hrs. on 11/4/2001 and also stated that he had sent a wireless message to all police stations to hunt for the vehicles involved in the crime and in support of his statement he produced a copy of the wireless message which required that the said 2 motorcycles be detained. PW6 head constable Sawant has stated that when the said panchnama was in progress PSI from Panaji police station, on receiving the information, came to the spot and arrested the accused Dinesh Naik as he was wanted in the crime registered at Panaji police station. PW7 P.I. Karekar has confirmed having arrested accused no.1 Dinesh at Panaji police station.

16. Counsel on behalf of the accused no.1 Dinesh Naik submits that as per the evidence of PW2 Pradip Sawant the motorcycle was taken by accused Anthony Dias and therefore accused Dinesh Naik could not have been found with the said motorcycle. Learned Counsel further contends that in case accused no.1 Dinesh Naik had met with an accident with the stolen motorcycle he would have ran away from the scene and would not have awaited for PW6 head constable Sawant to reach near the scene and

apprehend him. Learned Counsel further contends that no panch witnesses were examined to support the version of head constable Sawant. Learned Counsel also submits that the damage on the motorcycle might have taken place when the motorcycle fell down after the said Anthony Dias caught hold of the collar of his shirt from the back side of PW2 Pradip Sawant and both fell down. In my view, none of the submissions made on behalf of accused Dinesh Naik can be accepted. It is quite probable that the said Anthony Dias had snatched away the key of the motorcycle from PW2 Pradip Sawant but one certainly could not expect the said Anthony Dias to go away with 2 motorcycles from the scene and as per the prosecution the second motorcycle of PW3 Kambli was attached on the basis of the information given by the said accused Anthony Dias from Malim Bus Stand while the motorcycle of PW2 Pradip Sawant was attached when it met with an accident at Porvorim. The accused no.1 Dinesh Naik probably did not run from the scene either because he wanted to cling to the fruit of crime or had no opportunity to escape after people gathered, as that normally happens, after an accident. The evidence of head constable Sawant shows that the complainant's motorcycle was in his possession which he admitted when PW6 Sawant questioned him. The panchnama, the sketch and the inspection report obtained through PW5 Palkar clearly go to support the version of PW6 head constable Sawant that the accused Dinesh had met with an accident at Porvorim and was found with the said motorcycle. In the circumstances of

the case, it was certainly not necessary for the prosecution to have examined the panch witness in support of the panchnama carried out by the said PW6 Sawant after he reached the scene. In my view, the evidence of PW6 Sawant and PW5 Umesh Palkar when read with the documents produced by them convincingly proves the fact that accused Dinesh Naik was found in possession of the complainant's motorcycle when he met with an accident on the third day of the incident. In case the motorcycle had not met with the accident PW6 Sawant would not have sent the same for inspection. If not for the accident PW6 Sawant of Porvorim police station would not be concerned with the investigations. PW6 head constable Sawant's evidence is convincing and reliable. He is entitled to equal weight to be given like any other ordinary witness and his evidence cannot be rejected only because he is a police officer.

17. The accused has provided no explanation whatsoever, except for a bare denial, as to how complainant's motorcycle was found in his possession and he had met with an accident and in the absence of any such explanation the only inference which could be drawn is that the accused was part of the conspiracy and had actively participated in the commission of the offences alleged against him.

18. A Division Bench of this Court in the case of ***Prakash Parab V/s.***

State (2006(1) AIR Bom R 775) relying upon *Wasim Khan V/s. The state of Uttar Pradesh (AIR 1956 SC 400)* held that the possession of stolen goods recently after the loss of them, may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been connected with theft. This particular fact of presumption commonly forms also a material element of evidence in cases of murder; which special application of it has often been emphatically recognised. The Apex Court in this aforesaid decision also held that in the absence of any explanation, the presumption arises that any one who took part in the robbery also took part in the murder. In cases in which murder and robbery have been shown to form parts of one transaction, it has been held that recent and unexplained possession of the stolen property while it would be presumptive evidence against a prisoner on the charge of robbery would similarly be evidence against him on the charge of murder. The same view was followed by the Apex Court in *Ezhil and Ors. V/s. State of Tamil Nadu (2002 AIR SCW 2060)* wherein the Apex Court again held that in the absence of reasonable and plausible explanation by the accused persons as to legitimate or origin of their possession of articles of the deceased, presumption can be drawn not only of fact that they were in possession of the stolen articles after committing robbery but also committed murder of the deceased.

19. Considering the facts proved by the prosecution and the law laid down by the Apex Court and followed by the Division Bench of this Court in the case cited herein above, in my view the prosecution had proved beyond reasonable doubt its case against accused Dinesh Naik under Sections 342, 395 r/w 120-B I.P.C. In this context I may refer to the case of ***Saktu & Anr. V/s. State of U.P. (AIR 1973 SC 760)*** wherein the Apex Court speaking through three learned judges has held that where more than five persons took part in the dacoity but conviction of all of them was not possible for want of identification, conviction of less than five is permissible in law.

20. For reasons stated herein above there is no case for interference regarding the acquittal of accused no.2 Chandrakant @ Appu Talwar and accused no. 3 Prakash Naik. As regards accused no.1 Dinesh Naik, the appeal is partly allowed and accused no. 1 Dinesh Naik is hereby convicted under Sections 342, 395 r/w 120-B I.P.C.

21. Learned Counsel on behalf of the accused, on the point of sentence, states that the accused was in custody from 12/04/2001 to 3/07/2001. Learned Counsel further submits that the accused is 26 years of age and is a T.V. Mechanic, working on daily wages and therefore be dealt with leniently. The learned PP has left the matter regarding sentence to the discretion of the Court.

22. The accused is involved in a serious offence which is punishable with imprisonment for life or with RI for a term which may extend to 10 years and also liable to fine, under Section 395 I.P.C. However, the brain behind the entire incident appears to be the said accused Anthony Dias. Sentence must be always proportionate to the crime counted. Though no formula of a full proof nature is possible to be laid down in awarding appropriate sentence it should be proportionate to the crime committed. It is not only the rights of criminals which are required to be looked into at the time of imposition of sentence, but also of the victims of crime and the Society at large. Sentence to be imposed also should have deterrent effect.

23. Considering the facts of this case and the role played by the accused no.1 Dinesh Naik, in my view, the ends of justice would be met by imposing a sentence of 2 years RI under Section 395 I.P.C. and a fine of Rs. 5,000/-, in default to undergo SI for 3 months. The accused also is sentenced under Section 342 to undergo RI for 2 months and to pay a fine of Rs. 500/-, in default 15 days SI and under Section 120-B to undergo 2 years RI and to pay a fine of Rs. 1,000/-, in default to undergo SI for one month. The sentences imposed herein to run concurrently. The accused would be entitled to a set off for the period under detention undergone by him from 12/04/2001 to 3/07/2001. In case the fine is realised, a sum of Rs. 5,000/- shall be paid to the complainant Pradip Sawant by way of compensation. The bail bonds of

the accused are hereby cancelled. The accused shall surrender before the learned trial Court on or before 21st September, 2007 at 10.00 a.m. to undergo the sentence hereby imposed.

N.A. BRITTO, J.

NH/-